IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 575.

KENNEDY MINING AND MILLING COMPANY,
Plaintiff in Error,
vs.
ARGONAUT MINING COMPANY,
Defendant in Error.

Motion to Dismiss Writ of Error or Affirm the Judgment.

Comes the defendant in error herein, by its counsel, appearing in that behalf, and moves this Honorable Court to dismiss the writ of error in the above entitled cause, as this Court has no jurisdiction thereof.

And said defendant in error, by counsel as aforesaid, also moves the Court to affirm the judgment upon the following grounds:—

FIRST. It is manifest that even if this Court has jurisdiction the question on which jurisdiction depends is so frivolous as not to require further argument.

SECOND. The alleged federal question involved in the action was decided by the Supreme Court of California in accordance with the prior decisions of this Court.

THIRD. The decision of the Supreme Court of California is obviously correct, and could not have been otherwise upon the record presented.

FOURTH. Said writ of error was manifestly sued out for delay only.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Defendant in Error.

To Messrs. John M. Wright and Byron Waters, attorneys of record for plaintiff in error in the above-entitled cause:

You are hereby notified that the defendant in error in the above named cause will, on Monday, the 15th day of April, A. D. 1901, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motions, and the brief thereon hereto attached.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Attorneys for Defendant in Error.

Service of the foregoing motion, notice, printed argument in support of said motion, and copy of the printed

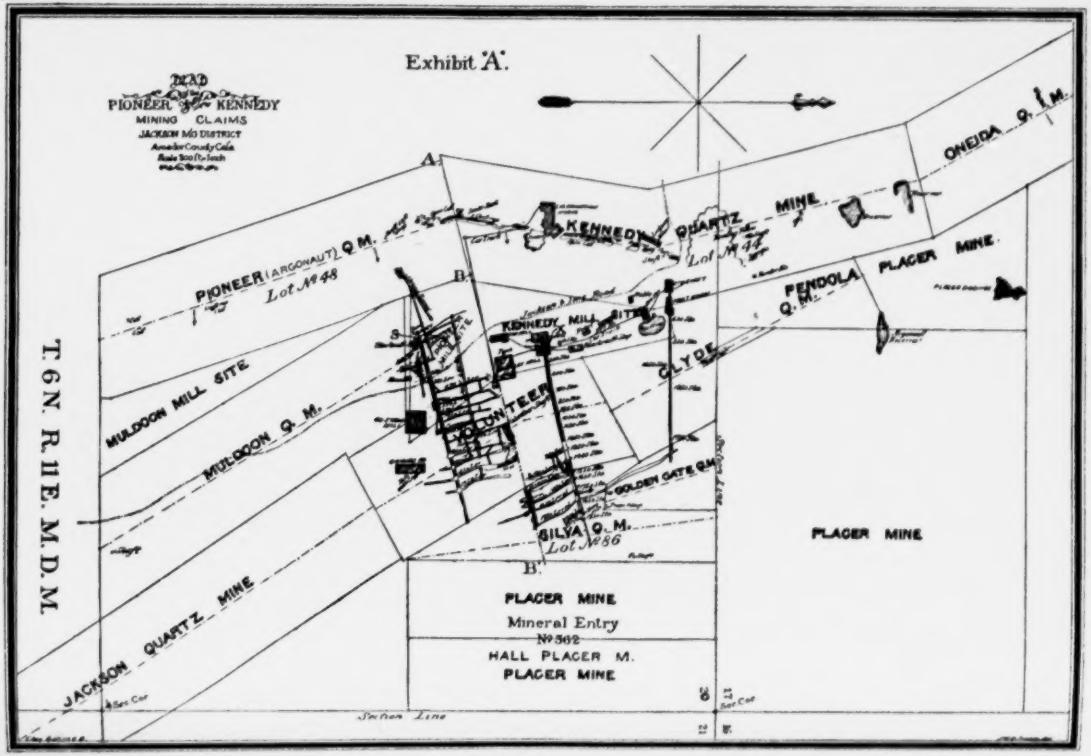


Exhibit 'A'.
MAP
PIONEER & KENNEDY
MINING CLAIMS
JACKSON MD DISTRICT
Amador County Cala.
Scale 200 ft. to Inch
T. 6 N. R. 11 E. M. D. M.
PIONEER (ARGONAUT) Q. M.
Lot № 48
KENNEDY QUARTZ MINE
Lot № 49
ONEIDA Q. M.
PENDOLA Q. M.
PLACER MINE
KENNEDY MILL SITE
MULDOON MILL SITE
MULDOON Q. M.
VOLUNTEER
CLYDE
GOLDEN GATE Q.M.
SILVA Q. M.
Lot № 86
PLACER MINE
JACKSON QUARTZ MINE
PLACER MINE
Mineral Entry
№ 562
HALL PLACER M.
PLACER MINE
Section Line
A
B
B'
S

record herein, and receipt of copies of the same is acknowledged this 14th day of March, 1901.

John M. Wright
Byron Waters.
Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

The action is trespass brought by the defendant in error, hereinafter referred to as the Argonaut Company, against the plaintiff in error, hereinafter referred to as the Kennedy Company, to recover damages for the wrongful extraction and conversion of gold-bearing ore from an underground segment of a vein alleged to be the property of the Argonaut Mining Company, and for the equitable relief of injunction restraining future trespasses. The case was tried upon an agreed statement. The facts of the case are simple, and may be succinctly stated by reference to the accompanying plat, which is a reproduction in miniature of the agreed map, Exhibit A, appearing opposite page 34 of the record.

The Argonaut Mining Company is the owner of the Pioneer or Argonaut Quartz Mine, Lot 48. The claim was located prior to the passage of the General Mining Act of May 10, 1872. Patent was applied for under the previous Act of July 26, 1866, and final entry and payment were made and certificate of purchase was issued February 23, 1872. Patent issued August 12, 1872, and contains the following granting clause:—

"Now Know Ye, that the United States of America " in consideration of the premises and in conformity with " the said Acts of Congress, HAVE GIVEN AND GRANTED, " and by these presents do give and grant, unto the said " Pioneer Gold and Silver Mining Company and to their " successors and assigns the said mining premises here- " before described at lot number forty-eight (48) embrac- " ing a portion of the northeast quarter of section twenty " (20) in Township Six (6) north of Range eleven (11) " east, Mt. Diablo Meridian, with the exclusive right of " possession and enjoyment of all the land included " within the exterior lines of said survey not herein " expressly excepted from these presents, and of fifteen " hundred and eighty-nine and 94-100 linear feet of said " Pioneer Quartz vein, lode, ledge or deposit as herein- " before described throughout its entire depth, although " it may enter the land adjoining, and of all the veins, " lodes, ledges or deposits throughout their entire depth, " the tops or apexes of which lie inside the exterior " boundary lines of said survey at the surface extended " downward vertically, although such veins, lodes, ledges " or deposits in their downward course may so far depart " from a perpendicular as to extend outside the vertical " side-lines of said survey;

" Provided that the right of possession hereby granted " to such outside parts of said veins, lodes, ledges or " deposits shall be confined to such portions thereof as " lie between vertical planes drawn downward through " the end lines of said survey at the surface so continued

" in their own direction that such vertical planes will " intersect such exterior parts of said veins, lodes, ledges " or deposits."

The Kennedy Company, plaintiff in error, owns the Kennedy Mine, Lot No. 44, which was located and entered for patent prior to May 10, 1872. The Kennedy Company asserts no title under it to any of the ore bodies in dispute, and for the purpose of the pending discussion it is a non-essential and immaterial factor, to be referred to only incidentally.

The Kennedy Company also owns the Silva Quartz Mine, Lot 86, its title resting on an entry made in October, 1892, twenty years later than the patent entry of the Pioneer or Argonaut.

With reference to the Pioneer and Kennedy mines the Argonaut and Kennedy Companies are co-terminous mining proprietors upon the same vein or lode, the top or apex of which passes through the Pioneer or Argonaut into the Kennedy. The common end line boundary is the line A–B on Exhibit A, crossing the lode at the point Z. The line A–B–B′ is the end line produced indefinitely in the direction of the dip or downward course of the vein.

Both parties have sunk working shafts the mouths or openings of which do not start at the outcrop or apex, but in front or to the east of it, each intersecting the vein, however, in depth, and all the workings of both parties to this litigation, so far as the ore bodies in controversy are concerned, are on this vein.

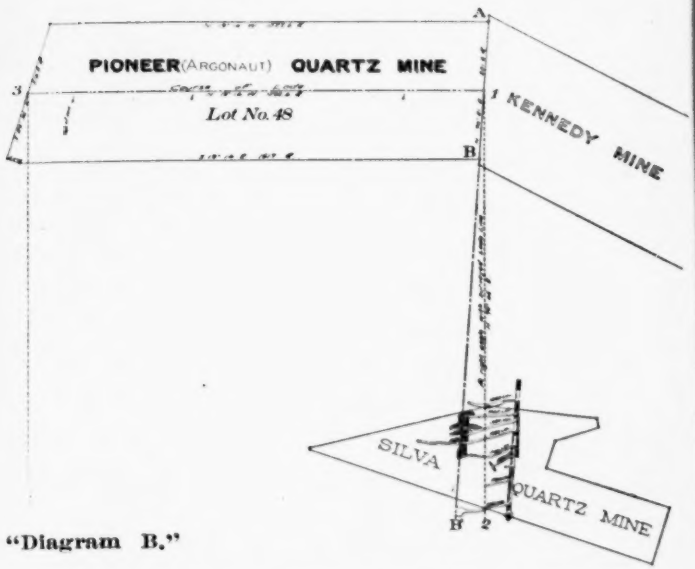
The vein on its dip or downward course passes underneath the Silva Quartz Mine belonging to the Kennedy

Company. The Silva was located and patented under the Act of 1872, on another vein having its top or apex within said Silva ground. The patent for the claim is shown in the record, at p. 31 and contains the following reservation :—

" First.—That the premises hereby granted with the " exception of the surface may be entered by the prop- " rietor of any other vein, lode or ledge the top or apex " of which lies outside the boundary of said granted " premises, should the same on its depth be found to " penetrate, intersect or extend into said premises, for " the purpose of extracting and removing the ore from " such other vein, lode or ledge."

The Kennedy Company, by means of drifts, levels and stopes extended southerly on the vein from its main working shaft, having its collar within the Kennedy Mine, crossed the extended common end line A–B–B′, and extracted the ore from the Pioneer vein, which ore was, however, vertically underneath the surface of the Silva.

The following diagram "B" will simplify the situation as it was dealt with by the Supreme Court of California :—



"Diagram B."

The end line A–B is practically at right angles to the general strike of the vein as it traverses the Pioneer location. Mathematically stated, the course of the vein as agreed upon is S. 19° 14′ E. or N. 19° 14′ W. (Par. XXI. Agreed Statement of Facts, Record, p. 29.) A course at right angles to this would be N. 70° 45′ E. as indicated by the line 1–2 on Diagram B. The line A–B therefore, with reference to the general course of the vein through the Pioneer location, considered in relation to the direction of the dip, forms an angle which is less than a right angle.

The southerly end line of the Pioneer or Argonaut with reference to the general course of the vein is somewhat greater than a right angle, and the two end lines diverge in the direction of the dip. The line 3–4 on

Diagram B is a line drawn from the southern extremity of the lode within the Pioneer or Argonaut claim and at right angles to the general course of the vein through that claim.

To summarize the situation, the Pioneer or Argonaut claim was located prior to or under the Act of July 26, 1866, and was entered for patent under that Act. Its end lines are not parallel, but diverge in the direction of the dip.

The ore bodies in dispute are on the Pioneer vein within planes drawn at right angles to the course of the vein within the location, and are within the extended end line planes of the Pioneer or Argonaut claim as defined in the patent. They are vertically underneath the surface of the Silva Quartz Mine, and are claimed by its owner, the Kennedy Company, as a common law incident of its ownership of the Silva Claim, and by reason of the non-parallelism of the Pioneer or Argonaut end lines.

The net value of the ore extracted by the Kennedy Company south of the line A–B–B′ and within the end line planes above described, after allowing for cost of extracting and reduction, was fixed by agreement at $56,099.95. The trial court gave judgment for the Argonaut Company for this amount, with interest from the date of the agreed statement. The Supreme Court of California sitting in banc affirmed the judgment.

We may epitomize the grounds of affirmance as gleaned from a reading of the opinion, which appears in full in the record, which has been printed by defendant in error

for the purpose of this motion (see Record, pp. 74–83), as follows:—

(1) Under the Act of July 26, 1866, under which the Argonaut or Pioneer was located, surveyed and entered for patent, the end lines of a location were not required to be parallel. That the sanction for this rule is found in repeated decisions of the Supreme Court of the United States.

(2) The Act of 1872, in which for the first time end lines of a location were required to be parallel, did not deprive a locator under the prior law of any rights acquired thereunder.

(3) The ore bodies in dispute are within the extended end line planes of the Pioneer or Argonaut, and are within vertical planes drawn through lines at right angles to the general course or strike of the vein applied at the extremities of the lode within the location. They are therefore the property of the Argonaut Company, and are no part of the Silva Quartz Mine claimed by the Kennedy Company. That this necessarily follows from the application of the principles announced by the Supreme Court of the United States in analagous cases.

The alleged "Federal Question" and the manner in which it was presented to the courts below by plaintiff in error will be outlined at the opening of the argument which follows.

Defendant in error now moves the Court to dismiss the writ of error for lack of jurisdiction, or to affirm the judgment upon the following grounds:—

FIRST. It is manifest that even if this Court has jurisdiction the question on which jurisdiction depends is so frivolous as not to require further argument.

SECOND. The so-called federal question alleged to be involved in the action was decided by the Supreme Court of California in accordance with the prior decisions of this Court.

THIRD. The decision of the Supreme Court of California is obviously correct, and could not have been otherwise upon the record presented.

FOURTH. Said writ of error was manifestly sued out for delay only.

In support of this motion we urge the following

POINTS AND AUTHORITIES.

I.

AS TO THE ALLEGED FEDERAL QUESTION AND THE MANNER OF ITS PRESENTATION TO THE COURTS BELOW.

There is no federal question stated upon the face of the complaint. The mere allegation of ownership of the mine and vein, and the trespass thereon, although the necessary inference is that title was derived through some act of Congress, does not suggest a federal question.

"It is well settled that a suit to enforce a right which "takes its origin in the laws of the United States is not "necessarily one arising under the Constitution or laws "of the United States, within the meaning of the juris-

" diction clauses, for if it did every action to establish " title to real estate (at least in the newer States) would " be such a one, as all titles in those States come from " the United States or by virtue of its laws."

Shoshone Mining Company v. *Rutter*, 177 U. S. 505, 507.

The answer in the case admits many of the facts alleged in the complaint, but denies the allegation of ownership of that part of the vein which is outside of and beyond the vertical plane drawn through the east side line of the Pioneer or Argonaut claim and upon which the trespass was committed. No right or title under any federal law is set up by the Kennedy Company. It does not plead the ownership of the Silva or anything else. It contents itself with the mere denial of plaintiff's rights.

The first assertion of a "Federal Question" in terms by the Kennedy Company before the trial court appears as a climax to a series of twenty-three objections to the consideration by the trial court of certain of the facts appearing in the agreed statement.

We quote from the record, page 54:

"And this defendant specially sets up and claims " that, in the decision of all and singular each and every " the questions raised by those of the foregoing objec- " tions which relate to the right and title asserted by " plaintiff to the ores in question by reason of its owner- " ship of the Pioneer Quartz Mine, Lot No. 48, as well " as in the decision of all and singular each and every " the questions raised by those of the foregoing objec- " tions which relate to the right and title asserted by " defendant to said ores by reason of its ownership of the " Silva Quartz Mine, Lot No. 86, is involved: First,

" the construction of the Act of Congress of the United " States, approved May 10, 1872, entitled 'An Act to " 'promote the development of the Mining Resources " 'of the United States,' under the provisions of which " plaintiff acquired its title to said Lot No. 48; " and, second, the construction of Chapter Six of Title " Thirty-two of the Revised Statutes of the United " States and legislation supplemental thereto, under the " provisions of which defendant acquired its title to said " Lot No. 86.

"And all and singular each and every of such objec- " tions are so specially set up and claimed by defend- " ant so as to apprise the court that the Federal " Questions so involved are presented for its considera- " tion and decision."

We may here remark parenthetically, as to these numerous objections, that the reception by the trial court of immaterial and incompetent evidence in no sense involves a federal question of which this Court will take cognizance.

" This court has no jurisdiction to consider and revise " the decision of a state court, however erroneous it may " be in admitting the evidence to establish the fact. But " when evidence is admitted as competent for this " purpose, and it is sought to give it effect for other pur- " poses which do involve questions giving the court " jurisdiction, then the decisions of state courts on the " effect of such evidence may be fully considered here, " and their judgments reversed or affirmed, in a similar " manner as if a like question had arisen in a Supreme " Court of error of a State, when reversing the proceed- " ings of inferior courts of original jurisdiction."

Dower v. *Richards*, 151 U. S. 658, 667;
Quoting from *Mackay* v. *Dillon*, 4 How. 421, 447.

The Supreme Court of California not only declined to give effect to the evidence considered by the trial court

over the Kennedy Company's objection, but held tentatively that the facts objected to were not material. The Court in its opinion makes use of the following language in this behalf, speaking through Justice Temple:—

"The cause was submitted in the trial court upon an "agreed statement of facts, each party having the "right to object to the relevancy, competency and mater- "riality of any part of it. Certain objections to evidence "were made by the appellant, which were overruled by "the court, and the main argument here has been in "regard to these rulings. Much of the evidenee was "objected to simply upon the ground of immateriality. "All that I deem it necessary to say in regard to such "rulings is that, admitting that the trial court erred, as "I am inclined to think it did, defendant has suffered no "harm. The question of law upon which the case must "turn is not changed or affected by receiving this imma- "terial evidence."

Record, p. 74.

Of the twenty-six errors now assigned and relied upon in this Court to reverse the judgment of the Supreme Court of California, twenty of them are the errors committed by the *trial* court in considering the facts objected to, which facts the appellate court rejected in reaching its conclusions. This class of objections and rulings to which is appended the assertion of "Federal Question", heretofore quoted, are entirely eliminated from the case by the action of the Supreme Court of California.

The Kennedy Company in the statement of the "Federal Question" asserted that there was involved the construction of the Act of Congress of May 10, 1872, "under the provisions of which plaintiff acquired its "title to said Lot 48 (the Pioneer); and second, the

" construction of Chapter 6 of Title 32 of the Revised " Statutes, and legislation supplemental thereto, under " the provisions of which defendant acquired the title to " said lot No. 86 (the Silva)."

The attention of the Court is nowhere specially directed to any other Act of Congress. The length and breadth of the " Federal Question " wherever it was suggested or presented by the Kennedy Company and urged upon the trial court was the construction of the Act of 1872 and the Revised Statutes which embody that act. With this in view we submit the following criticisms:—

1. It is not shown by the record that there was any controversy over the construction of the Act of 1872, as applied to the rights of the respective parties. Or, if there was a controversy, what construction would be favorable and what unfavorable to the Kennedy Company. Locations made under the Act of 1872 were required to have parallel end lines as a condition precedent to the enjoyment of the extralateral right. There is no room for controversy over this. Neither party denies it.

2. The Kennedy Company's statement of " Federal Question " contains a false premise. The title to the Pioneer or Argonaut Mine was not acquired under the Act of 1872. It was located, surveyed for patent, entered, paid for, and certificate of purchase issued several months before the Act of 1872 was passed, and twenty years before the Silva was located. The title was *acquired* under the Act of July, 1866. After the issuance of the certificate of purchase the government held the title in trust for the benefit of the entryman.

The certificate of purchase was the equivalent of a patent.

Benson Mining Company v. *Alta M. Co.*, 145 U. S. 428, 431–432;
Stark v. *Starr*, 6 Wall. 402;
Carroll v. *Safford*, 3 How. 441;
Wirth v. *Branson*, 98 U. S. 118.

The patent to the Pioneer was, it is true, not actually issued until after the Act of May 10, 1872, but it recites the entry made in February of that year, and that it was issued in conformity with the Act of July 26, 1866, as well as by authority of the Act of 1872.

(Record, p. 25.)

Section 9 of the Act of 1872 provided for the repeal of most of the sections of the Act of 1866, but specially preserved existing rights.

Section 2328, Revised Statutes.

Section 12 provides as follows: "Nor shall this act affect any right acquired under said act."

Section 16 contains the following proviso: "that nothing contained in this act shall be construed to impair in any way rights or interests in mining property acquired under existing laws."

As was said by Judge Field in the Eureka case (4 Sawy. 323), speaking of locations patented after the passage of the Act of 1872, but located prior thereto:—

"The Act of 1872 preserves to the miner the rights acquired under the Act of 1866, and confers additional rights."

The patent to the Pioneer confirmed the pre-existing rights acquired under the Act of 1866, viz., Pioneer Lode, and granted the additional rights,—i. e., all other lodes having their tops or apices within the surface boundaries.

We must conclude therefore that the rights of the plaintiff are to be determined, so far as the lode in question is concerned, by the Act of 1866—an act which the Kennedy Company wholly ignores in its statement of the "Federal Question."

If the ore bodies in dispute passed to the Argonaut Company under the Act of 1866, there is no possible rule of construction which could be applied to the Act of 1872 which would give them to the Kennedy Company. If there is any federal question before the Court it is not the one relied upon by the Kennedy Company. It pertains solely to the proper construction of the Act of July 26, 1866. It does not appear from the record that the Act of 1872 has been construed so as to deprive the Kennedy Company of anything granted to it by the act. This controversy does not affect the surface of the Silva or any vein which has its top or apex therein, which is *all* the Act of 1872 purports to grant. As was said by the Supreme Court of California :—

"Defendant asserts title to the ore by reason of its "ownership of the Silva ground under what he calls "the common law right to everything beneath the sur- "face."

Opinion, Record, p. 75.

In other words, under the Act of 1872 the Kennedy Company was granted the Silva surface, and all lodes

having their tops or apices therein. The ore bodies are claimed under the common law presumption that he who owns the surface owns everything beneath it. We submit that what are the common law incidents of ownership of a tract of land conveyed by the government is not a matter of federal cognizance.

The state courts are the exclusive judges of what the common law is, and of what common law rules of property are to be applied to federal grants of property within the state.

"Section 709 of the Revised Statutes points out the "cases in which the judgment or decree of the highest "court of a State in which a decision could be had may "be reviewed by the Supreme Court of the United "States."

McKenna v. *Simpson*, 129 U. S. 506, 510.

Plaintiff in error has not brought itself within any of the designated classes.

This Court has no jurisdiction to review a judgment of the highest court of a state unless a federal question has been either in express terms or by necessary effect decided by that court against plaintiff in error. The Kennedy Company claimed title under a location made under the Act of 1872. Its contention was that the Act of 1872 required parallelism of end lines as a condition precedent to the exercise of the extralateral right. The Court agreed with it, but held that the Pioneer or Argonaut title was acquired under the Act of 1866—a law which did not require parallelism of end lines. Plaintiff in error nowhere in the record contends that under the Act of 1866 end lines were required to be parallel, nor

does it complain that either the trial or State Supreme Court misconstrued the Act of 1866.

We respectfully submit that the writ of error should be dismissed.

II.

EVEN IF THIS COURT HAS JURISDICTION, THE JUDGMENT SHOULD BE AFFIRMED. THE ALLEGED FEDERAL QUESTION INVOLVED IN THE ACTION WAS DECIDED BY THE SUPREME COURT OF CALIFORNIA IN ACCORDANCE WITH THE PRIOR DECISIONS OF THIS COURT, IS OBVIOUSLY CORRECT AND COULD NOT HAVE BEEN OTHERWISE DECIDED UPON THE RECORD PRESENTED.

We are not unmindful of the fact that this Court does not look with favor upon motions to affirm coupled with motions to dismiss, where upon a consideration of the record it reaches a conclusion that a federal question is involved and was properly raised in the court below, and that it is customary when such conclusion is reached to postpone further consideration of the motion to affirm until the case is reached for argument on the merits. While we have heretofore urged upon the Court the lack of its jurisdiction in this case, have moved for a dismissal of the writ of error, and have faith in the correctness of our position, it is possible that the Court may be disinclined to adopt our views in that behalf expressed. In view of such an event, we are encouraged by several well considered opinions of this Court involving the proper practice in cases of this character, to present our motion to affirm, as an alternative.

In *Swope* v. *Leffingwell*, 105 U. S. 3, error to the Supreme Court of Missouri, this Court said :—

"We have jurisdiction of this case. The motion to "dismiss is, therefore, denied; but as the only Federal "question presented on the merits was decided by the "court below in accordance with our rulings in *National* "*Bank* v. *Mathews*, 98 U. S. 621, and *National Bank* v. "*Whitney*, 103 *Id.* 99, the motion to affirm is *granted*."

This rule was applied in

Chanute City v. *Trader*, 132 U. S. 210;

Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232.

In *Richardson* v. *Louisville, etc., R. R. Co.*, 169 U. S. 128, 132, the "Federal Question" was practically conceded, yet this Court said with regard to the action of the State Court that its "ruling was so obviously correct that we "do not feel constrained to retain the case for further "argument."

Suppose that a cause were now pending before this Court on writ of error from a state court, involving solely the question determined in the case of *Del Monte Mining and Milling Company* v. *Last Chance*, 171 U. S. 55, viz., "May any of the lines of a junior lode location "be laid within, upon or across the surface of a valid "senior location for the purpose of defining for or secur-"ing to such junior location underground or extralateral "rights not in conflict with any rights of the senior "location?" and the decision of the State Court followed the decision of this Court. Would this Court feel constrained to retain the case for argument on its merits, incurring a delay of not less than a year and

perhaps two years, when it is made manifest on the motion to affirm that there is but one way in which the question could be answered?

In the abstract a question may be federal in its nature, yet when it has once become settled by decisions of this Court, it is no longer such a question as may be invoked in later cases for the purpose of affording defeated litigants an opportunity to prolong a controversy and delay the termination of the litigation. It ceases practically to be a federal question.

As was said by Justice Brewer, sitting at Circuit:—

"Where a proposition has once been decided by the "Supreme Court it can no longer be said that in it "there remains a federal question. More correctly it "is said that there is no question, State or Federal. "This is the only fair starting point for a case like "this."

State of Kansas v. *Bradley*, 26 Fed. 289, 290.

See also—

Blue Bird M. Co. v. *Largey*, 49 Fed. 289, 291;
Montana O. P. Company v. *Boston & Montana*, 85 Fed. 867.

That the only question involved in the case at bar which partakes of a federal nature has been finally settled by this Court in its previous decisions does not, we think, admit of a doubt. The opinion of the Supreme Court of California, which by rule of Court is now made a part of the record, clearly shows that in rendering its decision it followed the previous decisions of the Supreme Court of the United States. It could not have decided otherwise without being amenable to the charge of judicial insubordination.

That this is true we think we can readily demonstrate, if any demonstration be necessary beyond the statements in the opinion.

It is conceded that the end lines of the Argonaut or Pioneer are not parallel. It is also conceded that the title to it originated under the Act of 1866, was surveyed for patent, final entry and payment made, and certificate of purchase issued under that act.

UNDER THE ACT OF 1866 PARALLELISM OF END LINES OF SURFACE LOCATIONS WAS NOT REQUIRED.

This doctrine was first announced by Judge Field in the Eureka case, 4 Sawy. 302, Federal cases No. 4548 from which we quote:—

"In the first place it does not appear upon what "locations the patents were issued. They may have "been and probably were issued upon locations made "under the Act of 1866 where such parallelism in the "end lines of surface locations was not required."

4 Sawy. 319.

This case will be further alluded to. It is the precise analogue of the case at bar.

The same distinguished jurist in the famous Horseshoe case, speaking for the Court said:—

"Under the Act of 1866 parallelism in the end lines "of a surface location was not required."

Iron S. M. Co. v. *Elgin M. & S. Co.*, 118 U. S. 196, 208.

In the Del Monte case this Court speaking through Mr. Justice Brewer said:—

"There is no inherent necessity that the end lines of "a mining claim should be parallel. Yet the statute" (Act of 1872) "has so specifically prescribed."

Del Monte Min. and Milling Company v. *Last Chance M. Co.*, 171 U. S. 55, 67.

From which the inference is irresistible that parallelism is not essential unless the statute so declares, which the Act of 1866 did not.

We find in the Del Monte case the following outline of the Act of 1866, and the object and function of surface lines of locations made under it.

"Obviously the statute contemplated the patenting "of a certain number of feet of the particular vein "claimed by the locator, no matter how irregular its "course, made no provision as to the surface area or the "form of the surface location, leaving the Land Depart- "ment in each particular case to grant so much of the "surface as was 'fixed by local rules,' or was in the "absence of such rules in its judgment necessary for "the convenient working of the mine. The party to "whom the vein was thus patented was permitted to fol- "low it on its dip to any extent, although thereby passing "underneath lands to which the owner of the vein had "no title. As might be expected, the patents issued "under this statute described surface areas very different "and sometimes irregular in form."

171 U. S. 55, 63.

We find in this a distinct recognition of the rule announced in the Eureka case, that parallelism of surface lines of a location under the Act of 1866, was not essential to the right of following the vein on its dip.

Walrath v. *Champion M. Co.*, 171 U. S. 293, impliedly at least, sanctions the rule.

The same principle has been frequently followed in the Circuit Courts and Circuit Court of Appeals.

Walrath v. *Champion M. Co.*, 63 Fed. 552, 556;
Con. Wyoming v. *Champion*, 63 Fed. 540, 550;
Carson City G. & S. M. Co. v. *North Star M. Co.*, 73 Fed. 597, 599;
S. C. on appeal, 83 Fed. 658, 669;
Certiorari denied by U. S. Sup. Ct., 171 U. S. 687.

Judge Hawley speaking for the Circuit Court of Appeals, in the case last cited said:—

"The Act of 1866 *under the provisions of which the "patent in this case was applied for*, and under which "the rights of defendant in error accrued, did not require "parallelism of end lines."
83 Fed. 669.

So much for the abstract proposition that end lines of a surface location under the Act of 1866 were not required to be parallel.

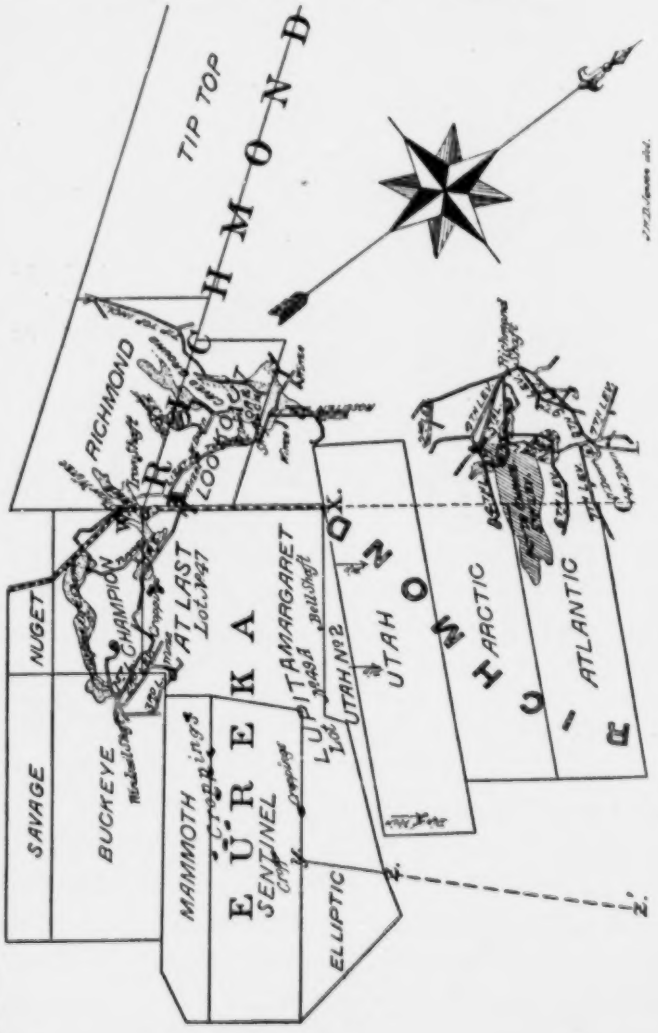
As to the application of the rule to cases similar to the one at bar, we present the Eureka case as it was presented to the Circuit Court and passed upon by the Supreme Court of the United States.

THE EUREKA CASE AND ITS RESEMBLANCE TO THE CASE AT BAR.

Accompanying the decision of the Circuit Court (4 Sawy. 302) of this famous case, is a diagram which represents its principal features. From this and the original exhibits used at the trial and for the purpose of presenting the Argonaut–Kennedy case to the State courts, we prepared a map, upon which is delineated such

physical features as will explain the precise questions involved, and will illustrate the striking similarity between the two cases.

This we herewith reproduce in miniature.



This figure is practically a reproduction of Exhibit "U" attached to the findings and judgment roll in the Eureka case.

The Richmond Company owned the Richmond, Tip Top, and Lookout claims, lying northwesterly of the line W–X, and the Eureka owned the Nugget, Champion, At Last, and Lupita, or Margaret, southeasterly of that line. This line W–X was a common boundary between the two companies. The ore body in dispute was the "Potts Chamber," which was bisected by a vertical plane drawn through the common boundary, W–X, and that line produced in the direction of C. The end lines of the At Last and Lupita were not parallel, but *diverged* in the direction of the dip, as represented by the lines W–X–C, and Y–Z–Z^1. The Richmond Company also owned the Utah, Arctic, and Atlantic locations overlying the dip of the lode, and underneath the surface of which was found the ore body in dispute. As to the position of the top apex of the vein, a mere casual reading of Judge Field's opinion (4 Sawy. 302) shows the lode to have been quite a broad mineralized zone, having tops and apices in all the locations of the Eureka Company. If there was no apex in either the At Last or Lupita, the question of non-parallelism of end lines could not have been injected into the case, as the end lines of the Champion were parallel.

One of the main contentions of the Richmond Company was that the end lines of the At Last and Lupita, belonging to the Eureka, were not parallel, as required by the Act of 1872. Therefore, the Eureka could not

follow the lode outside of its vertical side boundary. As a corollary to this, the Richmond was entitled to the ore bodies in dispute, because they were underneath the surface of the Utah, Arctic, and Atlantic, which belonged to the Richmond Company.

It does not require any great power of discernment, or faculty of analysis, to appreciate the absolute similarity between the facts of the Eureka-Richmond case and the Argonaut-Kennedy case.

When we compare the chronology of the two cases, we find that Judge Field in his opinion (4 Sawy. 319) says that it did not appear when the Eureka locations were made. He *assumed* they were made under the Act of 1866. There was a deed in evidence executed by the Eureka Company to the Richmond Company dated April 26, 1871, which recited the ownership by the Eureka Company of the Champion, At Last, and Margaret (Lupita) claims, which made the inference conclusive that they were located prior to that date,—i. e., under the Act of 1866.

Speaking of this, the Supreme Court of the United States said in its opinion affirming the judgment:—

"The Eureka Company at some time *before April 26, 1871*, but at what precise date does not appear, became "the owner of the Champion, At Last, and Margaret "(Lupita) claims."

Richmond v. *Eureka*, 103 U. S. 839, 841.

There is no room for ambiguity or infereuce as to when the Pioneer or Argonaut was acquired. It had passed to entry under the Act of 1866, and this fact appears on the face of the patent.

With reference to the position of the ore bodies in dispute in the Eureka case, the facts were found by the trial Court as follows:—

"17th. That the mining ground in dispute is situ-
"ated within the lode or ledge as hereinbefore described,
"and within planes drawn vertically down through the
"end lines of the plaintiff's patented location of the
"Champion claim, and within planes drawn vertically
"down through the extreme points of the patented loca-
"tions of the At Last and the Lupita or Margaret
"claims at right angles to the course or strike of the
"said lode or ledge and produced so as to follow the
"dip of the lode. The top or apex of said lode is within
"the surface lines of said patents to the plaintiff, and
"said lode dips at right angles to its course and on
"such dip extends under the surface of the Utah and
"Arctic claims of defendants."

This finding was undoubtedly made in order to apply the reasoning of Judge Field given in his opinion when speaking generally of end lines under local rules:—

"Lines drawn vertically down through the ledge or
"lode at right angles with a line representing this general
"course at the ends of the claimant's location will
"carve out, so to speak, a section of the ledge or lode
"within which he is permitted to work and out of which
"he cannot pass."

In awarding judgment in favor of the Eureka Company the trial court said:—

"Inasmuch as the ground in dispute lies within
"planes drawn vertically downward through the end
"lines of the plaintiff's (Eureka) patented locations, our
"conclusion is that the ground is the property of the
"plaintiff, and that judgment must be for its possession
"in its favor."

Eureka Case, 4 Sawy. at p. 325.

This judgment was affirmed by the Supreme Court of the United States, from whose opinion we select the following extracts:—

"The particular mining ground in dispute is situated "within the zone of limestone which has been described "and within planes drawn vertically down through the "end lines of the Champion Company as patented, and "within planes drawn vertically down through the ex- "treme points of the patented locations of the At Last "and Margaret claims at right angles to the course or "strike of the zone and produced so as to follow its dip."

"The top or apex of the zone is within the surface "lines of the patents to the Eureka Company, and the "zone dips at right angles to its course and on such dip "extends under the surface of the Arctic and Utah "claims. . . . The end lines of the surveys of the "At Last and Margaret (Lupita) claims as patented are "not parallel with each other."

Richmond v. *Eureka*, 103 U. S. 839, 844.

"The finding that the ground in dispute is within "the end lines and that the apex is within the surface "lines settles the rights of the parties between them- "selves *as well under their patents* as under their com- "promise agreement."

Id., p. 847.

In the case at bar the ore bodies in dispute occupy exactly the same position with reference to the properties of the parties litigant as those involved in the Eureka case. They are within planes drawn through the end lines of the Pioneer claim as patented and within planes drawn vertically down through the extreme points of the patented location at right angles to the course or strike of the vein and produced so as to follow its dip.

In the light of the decisions of this Court, it is impossible for us to conceive of any judgment which could

have been entered by the State court, except the one it has announced, unless it deliberately disregarded the rulings and decisions of this Court.

The decision by the Supreme Court of California was given in banc, and there is no dissent.

This writ of error was manifestly sued out for delay.

We respectfully urge that for the reasons hereinbefore set forth the writ of error should be dismissed, or in default of that the judgment should be affirmed.

Respectfully submitted,

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HENRY EICKHOFF,

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